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Qwest.
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REDACTED – FOR PUBLIC INSPECTION

VIA COURIER

EX PARTE

June 25, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97

Dear Ms. Dortch:

Qwest Corporation hereby submits the attached *ex parte* and request for confidential treatment (pursuant to the relevant Protective Orders) of certain confidential and highly confidential information included in the *ex parte*, in the above-captioned proceeding.

One copy of the non-redacted version is being submitted; and two copies of the redacted version are being submitted. For both the redacted and non-redacted versions, an extra copy is provided to be stamped and returned to the courier. Both the redacted and non-redacted versions of the *ex parte* are being served on Staff of the Commission's Wireline Competition Bureau as indicated below. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please contact me using the information above.

Sincerely,

/s/ Melissa E. Newman

Attachments

cc: (via e-mail)

Denise Coca (denise.coca@fcc.gov)
Jeremy Miller (Jeremy.miller@fcc.gov)
Tim Stelzig (tim.stelzig@fcc.gov)
Gary Remondino (two hard copies of the non-redacted version & via gary.remondino@fcc.gov)

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Qwest
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Daphne E. Butler
Corporate Counsel

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VIA COURIER

EX PARTE

June 25, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97

Dear Ms. Dortch:

Qwest Corporation ("Qwest") hereby requests confidential and highly confidential treatment of certain information included in the associated *ex parte*. The confidential and/or highly confidential information includes: business access line data, retail lines and revenue share in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas ("MSA")

The confidential information is submitted pursuant to the June 1, 2007 First Protective Order (22 FCC Rcd 10129, DA 07-2292) in WC Docket No. 07-97. The highly confidential information is submitted pursuant to the June 1, 2007 Second Protective Order (22 FCC Rcd 10134, DA 07-2293) in WC Docket No. 07-97. As required by the First Protective Order and the Second Protective Order, the confidential information (that is, the non-redacted version) is marked **CONFIDENTIAL – SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 07-97 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**, and the highly confidential information is marked **HIGHLY CONFIDENTIAL – SUBJECT TO SECOND PROTECTIVE ORDER IN WC DOCKET NO. 07-97 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**. Pursuant to both the First Protective Order and the Second Protective Order, Qwest requests that the non-redacted version of this *ex parte* (containing confidential and highly confidential information) be withheld from public inspection.

Qwest considers this confidential and highly confidential information as being extremely competitively-sensitive in nature. This type of information is "not routinely available for public inspection" pursuant to both Federal Communications Commission ("Commission") rules

47 C.F.R. §§ 0.457(d) and 0.459 (as Qwest explained and for which it provided legal justification in its Request for Confidential Treatment and Confidentiality Justification submitted with its four Petitions for Forbearance.

Qwest is simultaneously submitting, under separate covers, a non-redacted and a redacted version of the associated *ex parte*. The redacted version of the *ex parte* is marked **"REDACTED - FOR PUBLIC INSPECTION"**. Both the redacted and non-redacted versions of the *ex parte* are the same except that in the non-confidential version the confidential and highly confidential information has been omitted. This cover letter does not contain any confidential information.

If you have any questions concerning this submission, please call me on 303-383-6653.

Sincerely,

/s/ Daphne E. Butler

Attachment

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Daphne E. Butler
Corporate Counsel

Qwest. Spirit of Service™

REDACTED – FOR PUBLIC INSPECTION

VIA ECFS

EX PARTE

June 25, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97

Dear Ms. Dortch:

In this *ex parte* Qwest Corporation ("Qwest") provides additional information to support relief for Enterprise switched access.

A Review of Facts Regarding Qwest's Diminishing Business Customer Base[1]

[1] In its *Order* granting forbearance for ACS in the Anchorage, Alaska market, the FCC stated: "Consistent with the *Qwest Omaha Order*, we find that the data ACS and GCI have submitted regarding residential customers are a reasonable proxy for the number of mass market switched access customers served by each carrier." *See In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16323 ¶ 39 (footnote omitted) (2007) ("*ACS Order*"). Similarly, the

In each of its four petitions in this proceeding, Qwest has provided business access line quantities in service at various points in time, beginning with December 2000, in demonstrating the effects of telecommunications competition in that segment. Importantly, such data merely compares Qwest's in-service access line quantities over specific points in time and <u>excludes</u> access lines associated with customers who subscribe to services of Qwest's competitors without having first been a Qwest customer, and <u>excludes</u> customers lost to competition prior to December 2000, and thus, this data understates the actual effects of competition on Qwest's customer base. The following table recaps Qwest business access line data provided earlier in this proceeding:

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<u>Table 1</u>

Metropolitan Area	Qwest Business Retail Lines: 12/00	Qwest Business Retail Lines: 12/07	Difference: 12/00 vs. 12/07	Percentage Difference: 12/00 vs. 12/07
Denver MSA	[2]	[3]		%
Minneapolis-St. Paul MSA	[4]	[5]		%

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business data discussed in this *ex parte* can be considered "enterprise" business data as it relates to the issue of switched access forbearance in this proceeding.

[2] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area,* WC Docket No. 07-97, filed April 27, 2007 at 27 ("Colorado Petition").

[3] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver Metropolitan Statistical Area,* WC Docket No. 07-97, Qwest *Ex Parte* filed March 10, 2008 at 5.

[4] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area,* WC Docket No. 07-97, filed April 27, 2007 at 28 ("Minneapolis-St. Paul Petition").

[5] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area,* WC Docket No. 07-97, Qwest *Ex Parte* filed March 14, 2008 at 10.

Phoenix MSA	[6]	[7]		%
Seattle Metropolitan Division	[8]	[9]		%

--**End Confidential**--

Clearly, Qwest's retail business line losses in each of the four Metropolitan Statistical Areas ("MSAs") have been significant and ongoing. Further, as Qwest stated in each of its four petitions, "developing precise measurements of business 'share' in the business market is difficult, given the diverse scope of intramodal and intermodal competition that now exists" and the "general lack of available customer in-service data for these competitors."[10] However, Qwest does know the number of wholesale business services it is providing to competitive local exchange carriers ("CLECs") in the four MSAs, and has provided such data to the Federal Communications Commission ("FCC" or "Commission") previously in this docket (specifically with regard to unbundled network element ("UNE") loops, enhanced extended loops ("EELs"), Platform-Based services and resold business lines in service), and can offer calculations showing the proportion of such access lines as compared to Qwest's retail lines shown in the table above.

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<u>Table 2</u>

[6] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 07-97, filed April 27, 2007 at 27 ("Phoenix Petition").

[7] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *ex parte* filed February 21, 2008 at 4.

[8] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97, filed April 27, 2007 at 27 ("Seattle Petition").

[9] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *Ex Parte* filed March 5, 2008 at 5.

[10] *See, for example*, Denver Petition at 27.

Metropolitan Area	(A) Qwest Business Retail Lines: 12/07	(B) CLEC UNE-L, EEL, Platform-Based and Resold Business lines: 12/07	(C) Total Qwest and Non-Facilities Based CLEC Business Lines (A +B)	(D) Proportion Non-Facilities-Based CLEC Business Lines to Total (B/C)
Denver MSA	[11]	[12]		%
Minneapolis-St. Paul MSA	[13]	[14]		%
Phoenix MSA	[15]	[16]		%
Seattle Metropolitan Division	[17]	[18]		%

[11] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *Ex Parte* filed March 10, 2008 at 5.

[12] *Id.*, Updated Highly Confidential Exhibit 2.

[13] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *Ex Parte* filed March 14, 2008 at 10.

[14] *Id.*, Updated Highly Confidential Exhibit 2.

[15] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *Ex Parte* filed February 21, 2008 at 4.

[16] *Id.*, Updated Highly Confidential Exhibit 2.

[17] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Metropolitan Statistical Area*, WC Docket No. 07-97, Qwest *Ex Parte* filed March 5, 2008 at 5.

[18] *Id.*, Updated Highly Confidential Exhibit 2.

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-----------------------------------**End Highly Confidential**---

Importantly, the data reflected in Table 2 excludes business customers served by any other means, such as by CLEC-owned network facilities, facilities of cable providers, fixed wireless services, Voice over Internet Protocol ("VoIP"), etc.,[19] and thus, this data understates the true scope of business telecommunications competition in these four markets. However, even this narrowly-defined comparison clearly shows that CLECs serve a very significant proportion of the business telecommunications markets in the Denver, Minneapolis-St. Paul, Phoenix and Seattle metropolitan areas.

Finally, in its petitions in this proceeding, Qwest filed market research data provided by TNS Telecoms, an independent telecommunications primary research vendor, regarding the proportion of Enterprise business customer revenue Qwest retains in each of the four MSAs. As of fourth Quarter 2006, the TNS data indicated that Qwest's Enterprise market telecommunications revenue share was ***Begin Confidential***

End Confidential These data contrast the Enterprise market revenue Qwest retains against revenue of all other telecommunications service providers in that same market segment regardless of whether these providers purchase wholesale services from Qwest or utilize their own network facilities. Clearly, the Enterprise telecommunications markets in each of the four MSAs enjoy robust competition. In fact, Qwest is not a dominant provider in this market.

The *ACS Order*

In its *ACS Order*, the FCC made several findings with regard to interstate switched access that are directly relevant to Qwest's forbearance request in its four largest MSAs.[24] In

[19] Qwest has presented extensive evidence in its four petitions that providers such as XO Communications, Cox, Comcast, Integra, AT&T, PAETEC/McLeodUSA and many others are utilizing their own facilities to serve business customers.

[20] Denver Petition at 27.

[21] Minneapolis-St. Paul Petition at 28.

[22] Phoenix Petition at 28.

[23] Seattle Petition at 27.

[24] It is noteworthy that the FCC relied almost exclusively on competition from GCI, a cable-based telephony provider (similar to Cox Communications and Comcast Communications in Qwest's largest metropolitan areas, which are also actively serving mass market and Enterprise customers), for ACS's services in its determination that switched access relief was appropriate in the mass and Enterprise markets in Anchorage.

particular, the FCC found at paragraphs 34, 38 and 57 of its *ACS Order* (which are shown in full context in Attachment A to this *ex parte* for ease of reference):

- "With respect to enterprise switched access services, we reject commenters' contention that the Anchorage study area is overbroad for purposes of analyzing enterprise services." (paragraph 34).

- "We also find that ACS is subject to significant competition from GCI for enterprise switched access services." (paragraph 38).

- "We find that the criteria of section 10 are satisfied with respect to the requested relief for ACS's mass market and enterprise switched access services, subject to the conditions discussed below." (paragraph 57).

These findings are all directly relevant to Qwest's four forbearance petitions in this proceeding, from several perspectives. First, the FCC properly found that competition in the switched access market (encompassing the mass and Enterprise markets) is robust throughout the Anchorage study area and did not find it necessary to perform granular, wire center-level analyses with respect to the switched access market. Second, the FCC explicitly rejected commenters' contentions that the Anchorage study area, consisting of eleven wire centers in ACS's service territory, was overbroad. Third, the FCC concluded that the continued availability of unbundled loops in certain wire centers and the presence of robust competitive alternatives in the remainder means that mass market and Enterprise customers will be assured of competitive choice throughout the study area. Finally, the FCC determined that GCI, the cable-based telephone service provider in the Anchorage market, is an active competitor in the mass and Enterprise switched access markets.

<u>The Proper Analytical Focus for Switched Access</u>

A proper analysis of the switched access market should include an assessment of whether alternatives to Qwest's switching exist in the four MSAs[25] -- regardless of whether traffic is

[25] Qwest recognizes that the competitive nature of switching does not reduce the power of the so-called "terminating monopoly," in which any LEC that serves an end user customer controls access to that customer. Even CLECs are prohibited from tariffing rates for terminating interstate access above a Commission-established benchmark, and, when Qwest was granted switched access relief in Omaha, its own switched access rates were thereafter subject to the same benchmark as those of CLECs. *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order*, 20 FCC Rcd 19415, 19435 ¶ 41 (2005) ("*Omaha Forbearance Order*"), *pets. for rev. dismissed and denied on the merits*, *Qwest v. FCC*, 482 F.3d

carried over CLEC-owned loops, cable services loops, Qwest's wholesale loops, Special Access facilities or links provided via other means, such as wireless.[26] The plain answer to such an assessment is "yes." As it considers the scope of switched access relief that is appropriate, the FCC should not be distracted by "facts" regarding the extent to which physical loop alternatives exist--such as the GeoResults "fiber lit building" data provided by a group of CLECs or the fiber information supplied by XO Communications--since the manner in which the end user is connected to the switch is not relevant to the issue of dominant carrier forbearance for switched access services. The multiple means of carrying calls to and from the switched network will continue to exist <u>regardless</u> of the FCC's ultimate decision as to Section 251 forbearance in this proceeding.[27] With the exception of competitive telecommunications services provided via resale of Qwest's switched services (including services provided via integrated service platforms such as UNE-P, Qwest Platform Plus, and Qwest Local Services Platform), the competitive telecommunications service providers identified in Qwest's petitions in this proceeding are <u>all</u> using their own switches to originate and terminate switched calls to mass market and Enterprise customers in each of the four MSAs.[28]

In its *Triennial Review Remand Order* ("*TRRO*"), the FCC has already acknowledged that many alternatives to ILECs', including Qwest's, switched networks exist. In relieving the

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471 (D.C. Cir. 2007). Qwest agrees that the same limitation on Qwest's ability to tariff interstate switched access rates should part of the relief granted in these proceedings. *See In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97, Qwest *ex parte* filed June 13, 2008 at 3.

[26] As Qwest noted at page 8 of its May 15, 2008 *ex parte* in this proceeding, Nextlink (a subsidiary of XO Communications) provides fixed wireless broadband services in each of the four MSAs at issue, on a retail as well as on a wholesale basis, as a direct substitute for Qwest's loop and transport services.

[27] In many instances, particularly for large business customers with significant call volumes, direct physical connections -- in the form of Special Access or network facilities owned by Qwest's competitors -- are used to link end-user locations directly to interexchange carrier switches as a direct substitute for originating and terminating such calls through the local switched network, obviating the application of switched access charges in these instances.

[28] In its *ACS Order*, the FCC stated "Thus, we do not anticipate that mass market or enterprise switched access customers will face different competitive choices throughout the Anchorage study area by virtue of forbearance from section 251 unbundling." *ACS Order*, 22 FCC Rcd at 16320-21 ¶ 34. In its *Order*, the FCC found that ACS was relieved of Section 251 unbundling obligations in five of the 11 ACS wire centers in Anchorage, but granted mass market and Enterprise switched access relief in all 11 wire centers within the Anchorage study area.

ILECs of the continuing obligation to provide local switching as an Unbundled Network Element, the FCC concluded in paragraphs 205 – 208 (which are shown in full context in Attachment A to this *ex parte* for ease of reference):

- "Competitive LEC circuit switch deployment is the best indicator of whether competitive LECs have been able to overcome barriers to entry with respect to facilities deployment." (paragraph 205).

- "This evidence indicates that competitive LECs are not impaired in the deployment of competitive switches." (paragraph 206).

- "Competitive LECs are able to serve larger geographic areas because they can deploy higher capacity switches and use dedicated transport in combination with those switches to serve customers throughout a wider geographic area, beyond the particular wire center where the switch is located." (paragraph 207).

- "Competitive LECs can rely on newer, more efficient technology than incumbent LECS (whose networks have been deployed over decades), such as packet switches." (paragraph 207).

The FCC's reasoning in its *TRRO* applies with equal force to the issue of mass market and Enterprise switched access relief in this proceeding. Clearly, the FCC acknowledged that competitive switching alternatives are robust in the Enterprise market as well as the mass markets, regardless of the type of facilities (whether competitor-owned or leased from the ILEC) used to deliver switched calls to the end user. In this proceeding, while Qwest firmly believes the evidence it has presented justifies Section 251 relief with respect to unbundled loops throughout each MSA, if the Commission were to grant such relief in a subset of wire centers -- such as it did in Qwest's Omaha forbearance proceeding -- that would mean that unbundled loops would continue to remain available in the remainder of the wire centers for CLECs to utilize to deliver telephone traffic to end user locations. With respect to the issue of switched access relief, this means that the pervasive existence of switching alternatives, coupled with various alternative methods of physically delivering telephone calls to end-user locations, clearly supports a finding of relief for forbearance from dominant carrier regulation for switched access in the mass markets and Enterprise market segments, as fully described in Qwest's *ex parte* filing of June 13, 2008.

<u>Applicability of the *ACS Order* and the *TRRO* to Qwest's Petitions</u>

The FCC's findings in its *ACS Order* hold true with respect to switched access for each of the four MSAs at issue in this proceeding. The primary cable-based telephone service providers in the four Qwest metropolitan areas, Comcast and Cox, are actively and aggressively serving mass market and Enterprise customers, as discussed extensively in Qwest's petitions,[29] similar to the manner in which GCI is serving such customers in Anchorage. However, particularly in the Enterprise markets in the four Qwest metropolitan areas, there are numerous competitors,[30] beyond Comcast and Cox, actively serving Enterprise business customers, unlike in Anchorage where the principal competition was from a cable service provider. Additionally, the market for telephony switching in general is clearly competitive, as supported by the FCC's findings in its TRRO, throughout Qwest's service footprint in each of the four areas. Regardless of whether the Commission ultimately finds that Section 251 relief is appropriate in some, all or none of the wire centers in Qwest's four metropolitan areas at issue, it is fully justified to find, as it did in its *ACS Order*, that the various alternatives that will be available to Qwest's competitors in delivering switched telephone services warrant a finding in favor of the requested relief from dominant carrier requirements for switched access for all four Qwest metropolitan areas.

These facts, coupled with the FCC's earlier findings in its *TRRO* and *ACS Order*, compel a finding that the relief requested by Qwest for mass market and Enterprise switched access services identified in its four forbearance petitions, and as clarified in its June 13, 2008 written *ex parte*, is fully warranted in Qwest's service area in each of the four metropolitan areas.

Respectfully submitted,

/s/ Daphne E. Butler

Attachment A

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[29] *See* Denver Petition at 6-9, 21, 22; Minneapolis-St. Paul Petition at 6-9, 21-23; Phoenix Petition at 6-9, 20-23; and Seattle Petition at 6-9, 21, 22.

[30] *See* Denver Petition at 20-26; Minneapolis-St. Paul Petition at 21-27; Phoenix Petition at 20-27; and Seattle Petition at 20-26.

Excerpts From Triennial Review Remand Order ("TRRO")

205. In conducting our impairment analysis, we begin by considering evidence of competitive LEC circuit switch deployment, which is the best indicator of whether competitive LECs have been able to overcome barriers to entry with respect to facilities deployment. We find that the record demonstrates significant nationwide deployment of switches by competitive providers. Because our examination of switching investment shows no significant variation in switch deployment throughout the country, we adopt a national approach to local circuit switching.

206. As the Commission found in the *Triennial Review Order*, there has been a significant increase in competitive LEC circuit switch deployment over time, growing approximately 71 percent from 700 switches in 1999 to approximately 1,200 switches in 2003.[1] Incumbent LEC data indicate that competitive carriers are serving over 3 million mass market lines with those switches.[2] Further, pursuant to our "reasonably efficient competitor" standard, we consider competitive LECs' deployment of newer, more efficient switching technologies, such as packet switches.[3] Incumbent LECs cite evidence that, in the time following the *Triennial Review Order*, competitive LECs have focused on deploying softswitch technology and packet switches.[4] These switches are less expensive than traditional circuit switches and are more scalable.[5] This evidence indicates that competitive LECs are not impaired in the deployment of competitive

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[1] BOC UNE Fact Report 2004 at II-37. In addition, the record reveals that competitive switches are deployed not only in the densest urban areas, but in a range of less densely populated areas as well. *See, e.g.*, SBC Comments at 40 and n.118 (citing evidence of competitive switch deployment in "Springfield (Illinois); Seguin (Texas); Mojave (California); Lenexa (Kansas); Mishawaka (Indiana); Appleton (Wisconsin); and numerous other small towns"); Verizon Comments, Attach. J at 7-8 (citing examples of carriers serving mass market customers using competitive switches in low-density (fewer than 5,000 access lines) wire centers within the Boston, Massachusetts MSA, the Worcester, Massachusetts MSA, the Pittsburgh, Pennsylvania MSA, and the Providence, Rhode Island MSA).

[2] BOC UNE Fact Report 2004 at II-42. Various parties question the accuracy and usefulness of the data cited by the incumbent LECs. *See, e.g.*, Dialog Reply at 8; PACE *et al.* Reply at 6-7. It nonetheless is clear both that a significant number of competitive switches have been deployed nationwide, and that those switches are being used to serve some mass market customers. Moreover, as we discuss below, we find that competitive LECs generally are not impaired in their ability to serve mass market customers using competitive switches, regardless of the precise number of mass market customers being served using competitive switches today. Thus, our conclusions here do not rely on any specific numbers regarding the extent of competitive switch deployment.

[3] The Commission has defined "packet switching capability" as "'routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units' as well as the functions performed by DSLAMs." *Triennial Review Order*, 18 FCC Rcd at 17320, para. 535. Packet switches can be used to provide advanced services to all classes of customers, such as xDSL services. *UNE Remand Order*, 15 FCC Rcd at 3835-36, para. 307.

[4] BOC UNE Fact Report 2004 at II-37 through 38. BOC data states that as of year-end 2003, competitive LECs had deployed more than 8,700 packet switches.

[5] *Id.* For example, "[s]oftswitches offer two major advantages over conventional switches: cost and capabilities. They are less expensive to buy, take up less space, use less power and are easier to program and maintain." R. Poe, Next-Generation Switching Gives Power to Small Players, America's Network (June 1, 2004), cited in *id.* at II-37 n.194.

switches. As discussed below, we also find that competitive LECs are able to use switches, once deployed, to serve the mass market.

207. D.C. Circuit precedent instructs us to infer the absence of impairment "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis."[6] We find, based on the evidence in this record, that the fact that competitive LECs are able to serve larger geographic areas using self-provided switches mitigates to some extent the incumbent LECs' advantages of scale.[7] Competitive LECs are able to serve larger geographic areas because they can deploy higher capacity switches and use dedicated transport in combination with those switches to serve customers throughout a wider geographic area, beyond the particular wire center where the switch is located.[8] Thus, even though competitive circuit switches are not deployed as ubiquitously as incumbent LEC circuit switches, this does not prove that competitive LECs are impaired in wire centers where there currently are no competitive switches, as competitive LECs can and do serve such areas using switches located in other areas. In addition, pursuant to the "reasonably efficient competitor" standard discussed above, we evaluate impairment based on the technology a reasonably efficient competitive LEC would deploy.[9] Competitive LECs can rely on newer, more efficient technology than incumbent LECs (whose networks have been deployed over decades), such as packet switches.[10] Further, the ability of competitive circuit switches to serve wider geographic regions reduces the direct, fixed cost of purchasing circuit switching capability and allows competitive carriers to create their own switching efficiencies.[11]

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[6] *USTA I*, 290 F.3d at 422 (quoted by *USTA II*, 359 F.3d at 574); *see also supra* paras. 22, 41-45. While the Commission has recognized that competitive deployment is the best evidence of the lack of impairment, the absence of such deployment does not, in itself, demonstrate impairment. The Commission thus declines to adopt approaches that would require unbundling of switching in markets that do not *already* have a significant number of competitive switches deployed. *See, e.g.*, MCI Comments at 103-19; Texas Office of Public Utility Council *et al.* Comments at 13-14; NASUCA Comments at 23; Utah Committee of Consumer Services Comments at 14-16; ACN Reply at 2-3, 4-5; New Jersey Ratepayer Advocate Reply at 11, 19-20, 37-44, 55-58; PACE *et al.* Reply at 41-42.

[7] *See, e.g.*, MCI Comments at 103-19; Texas Office of Public Utility Council *et al.* Comments at 13-14; NASUCA Comments at 23; Utah Committee of Consumer Services Comments at 14-16; ACN Reply at 2-3, 4-5; New Jersey Ratepayer Advocate Reply at 11, 19-20, 37-44, 55-58; PACE *et al.* Reply at 41-42; *Triennial Review Order*, 18 FCC Rcd at 17282, para. 482.

[8] *See Triennial Review Order*, 18 FCC Rcd at 17010, para. 42; *see also* Qwest Comments at 54; Verizon Comments at 105; SBC Comments at n.130; Letter from Susan P. Kennedy, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338, WC Docket No. 04-313 at 5 (filed Oct. 18, 2004) (Commissioner Kennedy Oct. 18, 2004 *Ex Parte* Letter).

[9] *See supra* Part IV.A.

[10] Packet switches are newer, cheaper, and easier to deploy than traditional circuit switches. *See supra* para. 0. Moreover, in contrast to other network elements, such as loops or transport, switches have a significant capacity at a relatively small cost per customer and are not inherently linked to the service provided to any particular customer.

[11] PAETEC Comments at 3 (describing its use of a Class 5 switch to provide service to neighboring LATAs); *see also, e.g.*, BellSouth Comments at 20; SBC Comments at 42; Verizon Comments at 105-06; Qwest Comments at 54. For example, Verizon states that the average reach of competitive switches in the Boston MSA is over 40 miles. Verizon Comments at 106. BellSouth submitted evidence that a single switch in Tennessee was being used to provide service in six states in BellSouth's territory as well as four other out-of-region states. BellSouth Comments, Attach. 1 at 12; *see also, e.g.*, BellSouth Comments, Attach. 1 at 12-14 (discussing the geographic reach of competitive switches); SBC Reply at 72 (citing statements by MCI that it is able to serve large geographic areas from a single switch).

208. Our conclusion that competitive LECs can deploy and use competitive switches is supported by the evidence of competitive LECs employing UNE-L strategies. The BOCs submit evidence demonstrating that competitive LECs are providing service using competitive switching, in combination with unbundled incumbent LEC loops, to serve mass market customers in at least 137 of the top 150 MSAs.[12] The New York DPS also states that, in New York alone, there are 20 wire centers with three or more competitive LEC switches serving residential customers.[13] Other state proceedings also revealed the presence of competitive LECs serving the mass market using self-provided switches.[14] Indeed, the notion that all requesting carriers need access to UNE-P to serve the mass market is belied by the fact that GCI, Knology, FDN Communications, Cavalier Telephone, McLeodUSA, and others compete using UNE-L strategies.[15]

Excerpts from the ACS Forbearance Order

34. With respect to enterprise switched access services, we reject commenters' contention that the Anchorage study area is overbroad for purposes of analyzing enterprise services. GCI notes that pricing in the business market is customer-specific, and asserts that, if the Commission were to forbear from ACS's obligation to offer section 251 UNEs, different business customers would face different competitive alternatives depending upon the availability of GCI's facilities.98 Although the Commission ultimately granted ACS forbearance from section 251 unbundling obligations in certain wire centers in the *ACS UNE Order*, it targeted that relief to those wire centers where GCI had extensive facilities deployed. Thus, we do not anticipate that mass market or enterprise switched access customers will face different competitive choices throughout the Anchorage study area by virtue of the forbearance from section 251 unbundling. Likewise, ACS's commitment to offer residential and enterprise switched access services, under terms, conditions, and prices mutually agreed upon between ACS and GCI, is uniform throughout the Anchorage study area. (Footnotes omitted.)

38. *Enterprise Switched and Special Access Services.* We also find that ACS is subject to significant competition from GCI for enterprise switched access services, but lack record evidence regarding the extent to which GCI or other competitors provide special access service, particularly those that do not rely on ACS's tariffed special access offerings. GCI initially entered the Anchorage market as a long-distance carrier and competitive access provider. In 1998, GCI completed the construction of its fiber optic network, which is concentrated in the Anchorage midtown and downtown areas. GCI has been able to use its network facilities to provide competitive enterprise switched access offerings. Although we recognize GCI as an established competitor in the market for some types of enterprise services, we lack evidence to make any specific findings regarding the extent of GCI's role as a competitive provider of special access services. Although ACS claims

12 BOC UNE Fact Report 2004 at II-42.

13 New York DPS Comments at Attach. 2.

14 *See, e.g.*, Maryland PSC Comments, Attach. 4 at 14 (staff evaluation for purposes of the Maryland nine month proceedings); California PUC *et al.* Comments, Attach. at 66 (staff evaluation for purposes of the California nine month proceedings); Texas Office of Public Utility Council *et al.* Comments at 38, 47 (citing Texas data).

15 ACS Comments at 9 (discussing UNE-L competition in Alaska from GCI); BellSouth Comments at 18-19 (discussing UNE-L competition from Knology and FDN Communications); Qwest Comments at 54 (discussing UNE-L competition from McLeod and Cavalier).

that Dobson Cellular and AlaskaDigiTel provide wireless enterprise switched access services in Anchorage, there are no data in the record that justify our including these providers, or any other providers, in our analysis. (Footnotes omitted.)

57. We find that the criteria of section 10 are satisfied with respect to the requested relief for ACS's mass market and enterprise switched access services, subject to the conditions discussed below. First, our forbearance analysis under section 10(a)(1) requires that we determine whether enforcement of the regulations at issue is not necessary to ensure that charges, practices, classifications, or regulations for those services are not unjustly or unreasonably discriminatory. In its petition, ACS argues broadly that certain dominant carrier regulation of interstate switched access services, including end-user charges, is no longer necessary to ensure that ACS's rates and practices are just, reasonable and not unreasonably discriminatory, and that ACS therefore satisfies the criteria of section 10(a)(1) of the 1996 Act. More specifically, it contends that the Anchorage telecommunications market has become highly competitive and that ACS lacks market power. Further, ACS argues that the high level of competition for switched access services in the mass market and enterprise market will ensure that ACS's charges and practices remain just and reasonable and warrants forbearance from dominant carrier regulation of switched access services. (Footnotes omitted.)